No. 86 1738

Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLEY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY, and RICK BERNAS,

Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS, and ROBERT JENSEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Does the six-month statute of limitations, borrowed from 29 U.S.C. § 160(b) (1982), applicable to a hybrid breach of contract-breach of duty of fair representation action require that the complaint be served, not merely filed in court, within the six-month period, thus superseding Fed. R. Civ. P. 4(j)?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, Francis Lacina, David Galbraith, Bill Knight, George Craig, Ted Edwards, Charles Beeson, Donald Evans, Robert Beck, Lou Resinger, Andrew Rogers, Buck Germany, Dan Kelley, Marvin Gates, Wilburt Bond, William Gonzales, Lester Dixon, Frank Matney, and Rick Bernas, and the respondents G-K Trucking, General Cable, Penn-Central Corp., G-K Technologies, Eastern Carriers, and Robert Jensen.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Francis Lacina, David Galbraith, Bill Knight, George Craig, Ted Edwards, Charles Beeson, Donald Evans, Robert Beck, Lou Resinger, Andrew Rogers, Buck Germany, Dan Kelley, Marvin Gates, Wilburt Bond, William Gonzales, Lester Dixon, Frank Matney, and Rick Bernas respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on October 21, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 802 F.2d 1190 and is reprinted in the appendix hereto. *See infra* pp. A1-A10. The unpublished order by the Court of Appeals denying petitioners' petition for rehearing and suggestion for rehearing en banc is reprinted in the appendix hereto. *See infra* pp. B1-B2. The statement of uncontroverted facts and conclusions of law and order granting summary judgment of the District Court for the Central District of California (Ideman, J.), which are unreported, are reprinted in the appendix hereto. *See infra* pp. C1-C9, D1-D4.

JURISDICTION

Petitioners invoked the jurisdiction of the District Court for the Central District of California pursuant to the Labor-Management Relations Act, 1947, tit. III, § 301, 29 U.S.C. § 185 (1982). After the District Court entered summary judgment for respondents, a timely appeal to the Court of Appeals for the Ninth Circuit was taken.

The Court of Appeals rendered its opinion and judgment on October 21, 1986 and amended its opinion on December 30, 1986. A timely petition for rehearing and suggestion for rehearing en banc was denied on January 26, 1987.

This petition has been filed within ninety days of the denial of the petition for rehearing and is therefore timely pursuant to 28 U.S.C. § 2101(c) (1982) and Sup.

Ct. R. 20.4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

***29 U.S.C. § 2160(b) (1982)* Complaint and notice of hearing; answer; court rules of evidence inapplicable**

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The

person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28.

STATEMENT OF THE CASE

Petitioners brought this action pursuant to section 301 of the Labor-Management Relations Act, 1947, *codified as* 29 U.S.C. § 185 (1982). The District Court granted summary judgment in favor of respondent G-K Trucking on the basis of the relevant statute of limitations, *see* App. C8, and the Court of Appeals for the Ninth Circuit affirmed that decision, *see* 802 F.2d at 1193, App. A6. Because the reasoning of the Court of Appeals is in direct and irreconcilable conflict with a recent decision of this Court, *West v. Conrail*, No. 85-1804 (U.S. Apr. 6, 1987), its judgment must be vacated and the case remanded for further consideration in light of *West*.

Petitioners are sixteen former employees of respondent G-K Trucking, who were employed at its Montebello, California terminal. Petitioners claim that G-K Trucking violated the terms of certain labor agreements and riders to those agreements governing plant closures and the laying off of employees. The February 2, 1981 rider (commonly referred to as the "Concessions Rider") gave G-K Trucking the right to maintain a separate terminal which paid lower wages, required G-K Trucking to keep the Montebello terminal open, and allowed G-K Trucking to provide work through the second terminal only if all Montebello terminal employees were working. The July 27, 1981 rider (commonly referred to as the "Systems 99 Rider") provided that G-K Trucking would not reduce the number of employees at the Montebello terminal absent economic necessity. In October and November of 1981, G-K Trucking laid off eleven employees at the Montebello terminal. The union thereupon filed a grievance on behalf of these employees, which was decided in favor of G-K Trucking on November 10, 1982. In March of 1982, the Montebello terminal employees were approached by G-K Trucking for further concessions, which they refused. The Montebello terminal then was closed on April 16, 1982, and the remaining petitioners were laid off permanently at that time. No grievance regarding the closing of the Montebello terminal ever was filed. *See* 802 F.2d at 1191, App. A4.

Petitioners filed their complaint initiating this action on December 3, 1982. 802 F.2d at 1191-92, App. A5. After some discovery had been had, the district court entered summary judgment for respondents, App. D2, holding that the action was barred by the applicable

six-month statute of limitations, App. C8. The Court of Appeals then affirmed. *See* 802 F.2d at 1193, App. A10.

Both the district court, *see* App. C6-C7, and the Court of Appeals, *see* 802 F.2d at 1191, App. A5, retroactively applied *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 155 (1983), and held the six-month statute of limitations embodied in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), to be controlling. Consequently, the Court of Appeals concluded that the action was time barred if it accrued prior to June 3, 1982. *See* 802 F.2d at 1191-92, App. A5-A6. Applying a prior Ninth Circuit precedent teaching that under the circumstances the cause of action accrued when the employees learned or should have learned that the union had decided not to file a grievance, the Court of Appeals then affirmed "the district court's conclusion that, on or before June 3, 1982, as a matter of law, [petitioners] knew or should have known of the Union's decision not to pursue a grievance regarding the Montebello terminal closing." *Id.* at 1192, App. A6.[1]

Petitioners had argued, however, that an earlier complaint received and returned by the district court clerk on November 10, 1982 effectively "was 'filed' for statute of limitations purposes". *Id.* at 1192 n. 2. This result follows from another Ninth Circuit precedent,

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[1] More precisely, the District Court ruled that the petitioners had this knowledge "by the end of May, 1982." *See* App. C5. This difference of a few days is not material to the disposition of this case, however.

Loya v. Desert Sands Unified School District, 721 F.2d 279 (9th Cir. 1983), holding that "a complaint which arrives in the custody of the clerk within the statutory period but fails to conform with formal requirements in local rules" should be regarded as filed, *id.* at 281.

But the Court of Appeals rejected this argument, holding that "a section 301 action must be filed *and served* within the six-month limitations period". 802 F.2d at 1192 n.2, App. A6 (emphasis in the original). Hence, the Court of Appeals concluded that "[b]ecause the November 10 complaint was never served, it does not mark the date of the filing for purposes of the statute of limitations". *Id.*

The entire edifice of reasoning upon which the judgment of the Court of Appeals rests thus turns upon whether or not the complaint in a section 301 action must be served, as well as filed, within the six-month limitations period. If not, then "for purposes of the statute of limitations" the complaint must be regarded as filed on November 10, 1982. *Loya*, 721 F.2d at 281. In that case, the summary judgment in favor of respondents can be upheld only if as a matter of law petitioners knew or should have known prior to May 10, 1982 of the union's decision not to grieve the Montebello closing.

But the primary evidence relied upon implicitly by the District Court, *see* App. C-5, and explicitly by the Court of Appeals, *see* 802 F.2d at 1192, App. A6-A7, regarding the petitioners' knowledge of the union's intent is a letter dated May 17, 1982 to the union steward, which was only subsequently communicated to some of the petitioners, *see id.* The only other evidence even mentioned by the Court of Appeals is the

deposition testimony of some of the plaintiffs that "sometime" between the date of the terminal closing and an unspecified date "early in May of 1982" they either became aware or suspected that the union would take no action. *See id.*[2]

The issue of whether service of the complaint is necessary in order to comply with the requirements of the statute of limitations in a section 301 action is thus dispositive in this case. Only if the record supports the conclusion that as a matter of law the petitioners knew or should have known by May 10, 1982 that the union intended to take no action on their behalf, a position not even hinted at by the Court of Appeals and not taken by the District Court, can the judgment otherwise stand. Thus, if the Court of Appeals erred as to the necessity of service, its judgment must be vacated and the case remanded to it for further consideration.

REASONS FOR GRANTING THE WRIT

The Decision Of The Court Of Appeals Is In Direct And Obvious Conflict With A Recent Decision Of This Court, *West v. Conrail*, No. 85-1804 (U.S. Apr. 6, 1987).

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[2] Although the District Court found that as of April, 1982 most of the petitioners *believed* that the union would take no action, it went on to rule that they knew or should have known of this fact only "by the end of May, 1982." App. C5. But since the grant of summary judgement is reviewed by the Court of Appeals de novo, *see* 802 F.2d at 1191, App. A5, these somewhat contradictory factual findings have no significance other than as an aid to that court's comprehension of the basis for the ruling of the trial court.

The Court of Appeals for the Ninth Circuit squarely held in its opinion in this case that "a section 301 action must be filed *and served* within the six-month limitation period". 802 F.2d at 1192 n. 2., App. A6 (emphasis in the original); *see also Gallon v. Levin Metals Corp.*, 779 F.2d 1439, 1441 (9th Cir. 1986) ("six-month service requirement" adopted) *petition for certiorari filed*, 54 U.S.L.W. 3763 (U.S. May 7, 1986) (No. 85-1839). Just this month, however, this Court expressly ruled to the contrary. *West v. Conrail*, No. 85-1804, slip op. at 5 (U.S. Apr. 6, 1987).

Previously, this Court had ruled that the six-month statute of limitations embodied in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982), should govern hybrid actions brought pursuant to section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 (1982). *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 155 (1983). But the holding of *DelCostello* was not intended to require that any part of the Federal Rules of Civil Procedure, including Rule 4(j) governing the period within which service must be made, be superseded by any part of the National Labor Relations Act. *West*, slip op. at 5. Therefore, a hybrid section 301 action "is not barred if it has been 'commenced' in compliance with [Fed. R. Civ. P.] 3 within" the six-month period mandated by *DelCostello*. *West*, slip op. at 6; *see also id.* at 4 n.2 (equating Labor-Management Relations Act with Railway Labor Act at issue in *West* for purposes of this issue).

Hence, the Court of Appeals unquestionably "has decided an important question of federal law . . . in a way in conflict with applicable decisions of this

Court". Sup. Ct. R. 17.1(c). Accordingly, the writ of certiorari should be granted.

Where, as here, the Court of Appeals decision predates the conflicting decision of this Court, vacation of the judgment below and remand to the Court of Appeals for reconsideration in light of the recent decision has been the practice normally followed by the Court. *See, e.g., Lash v. Aikens*, 425 U.S. 947 (1976); *Kirwin v. Romano*, 425 U.S. 929 (1976); *Mathews v. Williams*, 424 U.S. 941 (1976). Inasmuch as the force of *West* seems so compelling that the Court of Appeals may well rule in petitioners' favor and thus obviate any need for further consideration of this action by this Court or at least substantially revise its reasoning and thus alter the context of the issues presented, this procedure would seem to be particularly appropriate. For this reason, should the petition for a writ of certiorari be granted, petitioners expressly request that the judgment below be vacated and the case remanded for further consideration in light of *West*.

CONCLUSION

Because the opinion of the Court of Appeals for the Ninth Circuit is irreconcilably in conflict with a recent opinion of this Court on an issue of law that is decisive as to the outcome of the case, this petition for certiorari should be granted. If in fact the petition is granted, the judgment of the Court of Appeals should be vacated and the matter remanded to it for further consideration in light of *West v. Conrail*, No. 85-1804 (U.S. Apr. 6, 1987).

Dated:April 23, 1987

Respectfully submitted,

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